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Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that law enforcement officers violated clearly established law, and thus were not entitled to qualified immunity, when at the time they acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them in order to observe and report on their conduct in properly executing a valid warrant?

PARTIES TO THE PROCEEDING

The petitioners in this case are all federal law enforcement officials. Petitioners Rodney Hanlon, Joel Scrafford, Richard C. Branzell, and Rodney Prieksat are special agents of the United States Fish and Wildlife Service in the Department of the Interior. Petitioner Kris A. McLean is an Assistant United States Attorney. Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were the United States of America (which was substituted as a party for purposes of the claim of trespass asserted originally against Kris McLean), as well as Turner Broadcasting Systems, Inc. and two of its employees, Robert Rainey and Donald Hooper. The petitioners are all individuals, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Paul W. Berger and his wife Erma R. Berger are the plaintiffs in this case, and they were the appellants in the court below.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

The ruling below sharply undermines the defense of qualified immunity that the Court has extended to federal, state, and local officials. The Court has consistently stressed that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question.

See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Before an official may be stripped of the defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which means that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The core issue in this case, which cries out for uniform treatment in the lower courts, is which sources of law may bear upon this determination when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake.

At the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. Indeed, the only three lower courts faced with the issue had upheld the lawfulness of such conduct. In these circumstances, it was egregious error for the Ninth Circuit to invalidate the defense of qualified immunity. Indeed, on the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), the ruling below should be summarily reversed. This disposition would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

Moreover, the lower federal courts are divided on the specific constitutional issue underlying the defense of qualified immunity raised in this case. Like the District Court here, the Eighth Circuit and the Fourth Circuit have upheld qualified immunity for law enforcement officers who allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Second Circuit, which denied qualified immunity in the same situation. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented on the qualified immunity issues that are cleanly presented in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), is reprinted in the Appendix to this petition ("Pet. App.") at 1a-26a. The Ninth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to petitioners and upheld their defense of qualified immunity. The District Court's opinion is unreported (except as *Berger v. Hanlon*, 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), and is reprinted at Pet. App. 27a-47a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *Id.* at 48a. The Ninth Circuit entered an order on March 13, 1998, which stayed the mandate in this case, pursuant to Federal Rule of Appellate Procedure 41, pending the filing of a petition for writ of certiorari in this Court. *Id.* at 50a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rejected the suggestion of rehearing *en banc* on February 25, 1998. Pet. App. 48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Fish and Wildlife Service Investigation.

This lawsuit stems from an investigation of respondents by the United States Fish and Wildlife Service in the Department of the Interior. The investigation occurred after federal officials received complaints and information from former employees of the Bergers, who indicated that Mr. Berger was violating federal law by using poisons to kill predators on his ranch, including eagles. Pet. App. 4a. The investigation ultimately resulted in the filing of criminal charges against Mr. Berger, who was convicted of using a registered pesticide (Furadan) in a manner inconsistent with its labeling, which was in violation of 7 U.S.C. § 136j(a)(2)(G). *Id.* at 7a. He was acquitted on various other counts.[1]

Petitioners in this case are four special agents of the United States Fish and Wildlife Service in the Department of the Interior and an Assistant United States Attorney who helped to plan and participated in the investigation. In the course of their investigation, they learned that Mr. Berger had allegedly poisoned or shot numerous eagles on his ranch over the years. Pet. App. 4a. In an effort to obtain evidence concerning these allegations, petitioners sought a warrant to search the Bergers' ranch, which covers about 75,000 acres in Montana. In response to their application, a magistrate judge issued a search warrant for the Berger ranch, which authorized the search of the ranch and all appurtenant structures, excluding the residence, for evidence indicating the illegal taking of wildlife. *Id.* at 5a. The reasonableness and validity of this warrant has never been in question in these proceedings.

Shortly before the federal agents applied for the warrant, they had been approached by employees of Turner Broadcasting System (TBS) and Cable News Network (CNN), to discuss whether an arrangement could be worked out to allow them to

[1] The facts alleged in the criminal information were that Mr. Berger laced sheep carcasses with Furadan, with the intent of killing predators, including eagles. Pet. App. 7a.

accompany the federal agents and observe and report on their conduct in properly executing the warrant. The court below succinctly described their objectives as follows: "The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime." Pet. App. 4a.

After some discussion of the matter, petitioner Kris McLean, the Assistant United States Attorney in charge of the Berger investigation, ultimately reached a letter agreement with an employee of CNN, confirming that the Office of the United States Attorney for the District of Montana would allow CNN to accompany federal agents "as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." Pet. App. 4a. The letter agreement specifically contemplated that CNN would shoot video footage of the agents' attempt to execute the search warrant, but placed any such videotape under embargo until any resulting criminal proceedings had been effectively concluded. *Id.* at 4a-5a.

B. The Execution of the Search Warrant.

On the morning of March 24, 1993, a team of federal law enforcement officers (including petitioners here), accompanied by a CNN media crew, proceeded in a caravan to a point near the Bergers' ranch. The officers were audiotaped and videotaped by the media crew at all times. Mr. Berger met the caravan on the road leading up to the ranch. The officers informed Mr. Berger that they were there to execute a search warrant, and he took them up to his residence. One of the officers, with Mr. Berger's consent, accompanied him inside the house to explain to Mrs. Berger what the officers were doing there. Pet. App. 6a.

Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew accompanied them and recorded their conduct as they went about executing the warrant. The media crew, however, did not actively participate with the officers in a search for evidence. Pet. App. 36a. The

evidence gathered by the law enforcement officers later served as a basis for the federal prosecution of Mr. Berger. In that proceeding, Mr. Berger filed a motion to suppress, contending that the warrant was defective and the officers lacked probable cause to search the property. The motion to suppress evidence was denied. *Id.* at 7a.

C. The District Court Proceedings.

The Bergers sued petitioners and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging the violation of their constitutional rights. They also appended various other federal and state law claims against the media that are not at issue here. The principal contentions under *Bivens* were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media had acted sufficiently in concert with the officers to be treated as government actors for purposes of this lawsuit. Pet. App. 2a. Petitioners moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, raising the defense of qualified immunity.

The District Court treated the motion as one for summary judgment, and upheld the defense of qualified immunity. The court began by recognizing, correctly, that the plaintiffs bore "the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act," which requires a survey of the legal landscape "as it existed at the time of the conduct in question." Pet. App. 31a. The court stated that it would begin with binding Supreme Court or Ninth Circuit precedent, and in its absence would proceed to consider all available decisional law that preceded the actions in question. *Id.*

The court concluded that there was *no* authority -- binding or otherwise -- holding that petitioners' conduct violated the Fourth Amendment at the time that they had acted. Based on this conclusion, in a trenchant recitation of the controlling law in this area, the court held that the defense of qualified immunity was proper:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.
>
> No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

Pet. App. 34a (citing, *inter alia*, *Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).

The court went on to hold that the Bergers were collaterally estopped from relitigating the reasonableness of the search because those same issues had been decided adversely to Mr. Berger in his criminal trial. Pet. App. 39a-40a. It also held that the media had not become government actors for purposes of *Bivens* liability. *Id.*

D. The Decision by the Court of Appeals.

On each of these points, the Ninth Circuit reversed. On the issue of qualified immunity, in particular, the court cited with approval the Second Circuit's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), which "held that even though there was then no reported decision expressly forbidding agents from inviting the press into

the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. The court went on, however, to alter the normal approach in determining whether the law was clearly established at the time by stating:

> We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

Id. at 11a-12a.

In the ensuing passage, the court half-heartedly sought to distinguish the contrary holdings on qualified immunity reached by the Eighth Circuit in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), and by the Fourth Circuit in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, Nos. 96-1185 & 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc), without squarely addressing the conflicting analysis undertaken in either of those decisions. Pet. App. 12a. The court also tried unpersuasively to distinguish the prior cases to the contrary that the District Court had relied on to uphold the defense of qualified immunity, opining that in each of those cases "the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." *Id.* at 13a (citing *Moncrief*, *Higbee*, and *Prahl*).

The Ninth Circuit also held that collateral estoppel did not apply in this case, and that the media must be considered to have acted jointly with the federal officers and thus "under color of law." Pet. App. 3a. (Petitioner does not challenge either of these latter holdings here, but contests only the issue of qualified immunity.) A timely petition for rehearing was denied, *see id.* at 48a, and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question so as to invalidate a defense of qualified immunity, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? In particular, where other courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Petitioner suggests that the correct answer is clearly in the negative, and that the Court's precedents directly mandate a summary reversal in this case on the issue of qualified immunity.

In addition, the lower courts are now squarely divided on the precise issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. The Ninth Circuit has sided with the Second Circuit, against the Eighth and Fourth Circuits, by rejecting the defense of qualified immunity raised by petitioners here. This growing circuit split is tremendously significant for law enforcement officials, whose functions and duties are enhanced by ensuring that their actions are reported to the public accurately and pervasively. Moreover, the chill that would be cast upon all law enforcement activity by requiring these officials to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages is intolerable and cannot be reconciled with the purposes of qualified immunity.

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT OFFICERS VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISIONS SO HELD AND EVERY COURT TO RULE ON THIS CONDUCT HAD FOUND IT LAWFUL.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The core issue in this case, which demands consistent treatment in the lower courts, is which sources of law may bear upon this determination when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake.

Instead of applying the governing principles laid down by this Court, the court below turned the traditional qualified immunity inquiry upside-down. In rejecting the defense raised by petitioners in this case, the Ninth Circuit purported to find "even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of" such conduct. Pet. App. 11a-12a. That observation, however, is entirely irrelevant to the proper legal analysis. The District Court already had correctly discredited this argument when plaintiffs put it forward on the motion for summary judgment:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

Pet. App. 34a.

In fact, at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. Even more to the point, the only lower courts that had addressed these same circumstances had upheld the lawfulness of such conduct. *See Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). *See also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (holding that such conduct does not infringe any fundamental right triggering more exacting equal protection scrutiny). In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity.

Indeed, on the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), the ruling below should be summarily reversed. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472

F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Accepting the federal officials' defense of qualified immunity, the Court held that in light of these two unpublished decisions, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," and thus he was entitled to qualified immunity. *Id.*

Summary reversal in this case would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Indeed, the Court recently used the mechanism of summary reversal to overturn another flawed Ninth Circuit ruling on qualified immunity, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). The importance of close adherence to these principles in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial," is manifest. *Mitchell*, 472 U.S. at 526 (emphasis in original). The same disposition is even more clearly justified in this case, where the result is dictated by the Court's controlling precedent in the *Mitchell* case.

The difficulty that the Ninth Circuit experienced in this case, and that other lower courts encounter from time to time, is what should be done in instances where no controlling authority from the Supreme Court or the pertinent Court of Appeals has fairly addressed the specific legal issue underlying the claimed defense of qualified immunity. In *Harlow*, the Court expressly declined to decide when and in what circumstances lower court case law can resolve the central question of whether the law was "clearly established" one way or the other. *See id.*,

457 U.S. at 818 n.32. Some courts have held that the absence of clear authority from these sources of controlling precedent is itself decisive in favor of qualified immunity. *See, e.g., Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3704 (Apr. 27, 1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 118 S. Ct. 412 (1997). Others, such as the court below in this case, view this situation as a broad license to cast about for more tangential analogies to more generalized precedents. *See* Pet. App. 10a-11a. A more restrained approach, as put forth by petitioners here, would be to look to other lower courts that have fairly addressed the specific actions at issue and to consider whether those precedents indicate any clear trend in the law demonstrating the patent unlawfulness of that conduct. *See, e.g., Bartlett v. Fisher*, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test."). But particularly where -- as here and as in *Mitchell* -- there is no controlling authority that clearly establishes the law one way or the other, and the apparent tenor of other court decisions confirms that the law was at least unsettled, or indeed was settled in favor of the lawfulness of such conduct, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.[2]

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[2] Commentators have noted the lack of definitive guidance from the Court on this issue. *See, e.g.*, James Flynn Mozingo, *The Confounding Prong of the* Harlow v. Fitzgerald *Qualified Immunity Test: When Is a Constitutional Right Clearly Established?*, 17 AM. J. TRIAL ADVOC. 797, 806 (1994) (Supreme Court's "shortcomings" in failing to define "clearly established" law include its failure to "acknowledge whether opposite or inconsistent rulings between the district courts, or likewise a division among the circuit courts, can prevent a law from being 'clearly established,' thereby mandating a judgment for immunity"); Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 627 (1993) ("lower courts have had to struggle with the 'where to look' problem when resolving qualified immunity disputes"

Here the District Court analyzed the issue in these terms, but the Ninth Circuit failed to do so. *Compare* Pet. App. 34a *with id.* at 11a-12a. The reviewing court's error is only magnified by the fact that one of the decisions that was cited on point (*Higbee*) was rendered by a District Court located within the Ninth Circuit itself. Even were this not so, the Ninth Circuit's determination to ignore two unpublished federal rulings and one intermediate state-court decision to the contrary clashes directly with the holding and approach adopted by this Court in *Mitchell*. This failure to come to grips with lower court precedents from other jurisdictions that had upheld the lawfulness of such conduct is also flatly inconsistent with this Court's approach in *Procunier*, 434 U.S. at 563-65 & nn.8-10, which considered decisions from other jurisdictions in concluding that the law was not "clearly established" against the public officials who had been sued in that case. *See also Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents'") (citation omitted; brackets in original).[3]

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and "have not been uniform in their approaches to the issue"); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1751 (1991) (ten years after *Harlow*, the question of where to look for clearly established law "remains unresolved"); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605 n.41 (1989) (the Supreme Court has not answered "whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant").

[3] *See also* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 145 (1991) ("Most courts of appeals conclude that a constitutional right is not clearly established if the relevant cases in the defendant's own jurisdiction or in other jurisdictions are conflicting.") (footnotes omitted).

Nor may a court in this situation saddle public officials with personal liability in money damages merely because the court is adamantly persuaded that its own legal judgments should have been obvious on their face to everyone. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. In this case, moreover, the underlying Fourth Amendment issues plainly are not obvious, even today, to many of the federal and state judges who are vested with the authority to address them. *See Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996) (alleged constitutional violation based on media accompanying officers to observe and report on their conduct is not "self-evident"), *cert. denied*, 117 S. Ct. 1081 (1997); *Wilson v. Layne*, Nos. 96-1185 & 96-1188, 1998 WL 159673, at *4 (4th Cir. Apr. 8, 1998) (en banc) ("reasonable jurists can differ on this question").

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their responsibilities with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). It is only by faithful application of the settled principles established by this Court that law enforcement officers can "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Without steady application of these principles, officers will be subjected to "undue interference with their duties" and "potentially disabling threats of liability." *Elder*, 510 U.S. at 514. Summary reversal is therefore warranted in this case, and will serve the useful purpose for sound judicial administration of reasserting this Court's authority to superintend the lower courts in ensuring strict fidelity to the important doctrine of qualified immunity.

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE CLEARLY ESTABLISHED LAW BY ALLOWING THE NEWS MEDIA TO ACCOMPANY THEM AND REPORT ON THE EXECUTION OF A VALID WARRANT.

The circuit courts of appeals are also divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether it violates clearly established law for law enforcement officers to allow members of the news media to accompany them in order to observe and report on their conduct as they properly execute a valid warrant on private property.

Like the District Court here, the Eighth Circuit has upheld qualified immunity for law enforcement officers who allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Second Circuit, which denied qualified immunity in the same situation. Subsequent to the ruling below in this case, the Fourth Circuit has issued an *en banc* decision upholding qualified immunity in the same circumstances, agreeing with the Eighth Circuit's approach and disagreeing with the decision below and the previous holding by the Second Circuit. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented on this underlying issue.

In *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), the Second Circuit held that it has long been clearly established, at least since the outset of the American republic, that such conduct would violate the Fourth Amendment. In *Ayeni*, federal agents from the Secret Service executed a search warrant in the plaintiffs' home. The agents were accompanied by members of a CBS television news crew, who did not assist in the search, but videotaped the officers' actions in executing the search warrant. The Second Circuit held that this conduct violated the Fourth Amendment and that the federal officers were not entitled to qualified immunity, even

though no court ruling had ever addressed or disapproved of such conduct:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant . . . [The Secret Service agent] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

Id. at 686.

The Second Circuit's approach has been soundly criticized by the Sixth Circuit, which noted that "*Ayeni* may be distinguished by the court's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995). This criticism more faithfully reflects the Court's own precedents governing the application of qualified immunity than does the very general analysis employed in *Ayeni*. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at a vague level of generality thus would eviscerate the

important protections that the Court affords through the doctrine of qualified immunity. *Id.* The District Court understood these lessons and applied them correctly in this case, *see* Pet. App. 30a-31a, whereas the Ninth Circuit did not.

In contrast, the Eighth Circuit Court of Appeals has held that even in February 1994 it was not clearly established that such conduct violated the Fourth Amendment. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). The court recognized that the only court rulings on point at that time were *Higbee*, *Moncrief*, *Prahl*, and *Avenson*, and that each had upheld the lawfulness of the officer's actions. "In assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the torts of which the plaintiffs complain." *Id.* at 447 (citing *Harlow*, 457 U.S. at 818-19, and *Mitchell*, 472 U.S. at 530). The Eighth Circuit then dismissed the relevance of *Ayeni*, pointing out that because the Second Circuit's decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity." *Id.*

Yet the Eighth Circuit also rejected the Second Circuit's position more pointedly. In *Ayeni*, the court had ruled that the law was *always* clearly established that to allow members of the news media to accompany, observe, and report on the conduct of officers properly executing a valid warrant would violate Fourth Amendment. *See Ayeni*, 35 F.3d at 686. The Eighth Circuit explicitly considered and rejected this broad declaration about the state of the governing law, which it found to be mixed at best:

> Even if we believed that [*Ayeni* was] entitled to consideration, [it] would appear to us to indicate at most only the beginnings of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.

Parker, 93 F.3d at 447. For this reason, the Eighth Circuit

parted ways with *Ayeni*: "Accordingly, we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional principle of which the police, at the time they executed their search warrant, should have been aware." *Id.*

In ruling on the qualified immunity issue in this case, the court below rejected *Parker* and embraced *Ayeni*, concluding that "even though there was then no reported decision expressly forbidding agents from inviting the press" to accompany them and observe and record their execution of a warrant, "no reasonable officer could have thought it permissible." Pet. App. 11a (citing *Ayeni*, 35 F.3d at 686). The court below barely acknowledged the contrary holding in *Parker*, which it purported to distinguish without providing any supporting rationale for the supposed distinction. The court also virtually ignored the Fourth Circuit's panel decision in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), which the full court, sitting *en banc*, has now reaffirmed. *See* Pet. App. 12a. It did not seriously address the prior precedents of *Higbee*, *Moncrief*, and *Prahl*, which it recognized had "upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity," even though *Higbee* was a decision by a district court within the Ninth Circuit. Pet. App. 12a. Instead, the court below brushed aside these contrary decisions by briskly declaring -- with no supporting legal or factual authority -- that there had been greater cooperation between the officers and the media in this case than in those three situations. *See id.*

The Fourth Circuit has now further deepened this circuit split. Before the decision below was rendered, a Fourth Circuit panel had ruled that it was not clearly established in April 1992 that such conduct violated the Fourth Amendment. *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997). That ruling was later vacated when the full court granted *en banc* review. Subsequent to the decision below in this case, the Fourth Circuit rendered a 6-5 decision upholding the law enforcement officers' claim of qualified immunity. *Wilson v. Layne*, Nos. 96-1185 & 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc).

The court agreed with the Eighth Circuit's holding in *Parker*, and relied upon the earlier decisions in *Moncrief*, *Higbee*, and *Prahl*. *Id.* at *4. It was not persuaded by the contrary holdings in this case and *Ayeni*, succinctly noting that because "reasonable jurists can differ on this question, we cannot say that the law was so clear that a reasonable officer must have known his actions transgressed constitutional bounds." *Id.* The dissenting judges, of course, took precisely the opposite view about the rectitude of these competing precedents. *Id.* at *12 (Murnaghan, J., dissenting).[4]

The indubitable result of these decisions is a direct and irreconcilable conflict, which will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The Second Circuit has held that law enforcement officers have *always* violated clearly established law if they allow members of the news media to accompany them in order to observe and report on their conduct in properly executing a valid warrant because this activity is so plainly and egregiously unconstitutional. *Ayeni*, 35 F.3d at 686. The Eighth Circuit has held that it is not "self-evident" that this activity violates the Fourth Amendment, that "at most" there is "only the beginnings of a trend in the law" to this effect, and that officers were thus entitled to qualified immunity when they engaged in this activity in February 1994. *Parker*, 93 F.3d at 447. In this case, the Ninth Circuit has expressly aligned itself with *Ayeni* by holding that "a residential search videotaped by commercial television crews was unreasonable, and the officers unprotected by qualified immunity." Pet. App. 13a. Even though no cases had expressly said so when these officers engaged in such activity in March 1993, the court agreed with *Ayeni* that such conduct had always been understood to violate

[4] The dissent observed that "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Wilson*, 1998 WL 159673, at *21 (Murnaghan, J., dissenting).

clearly established law. *Id.* Since the ruling below, the Fourth Circuit has explicitly rejected its conclusions and sided instead with the Eighth Circuit by holding that officers were entitled to qualified immunity for allowing media to accompany them and report on their conduct in April 1992. *See Wilson*, 1998 WL 159673, at *6. It cannot be denied, therefore, that law enforcement officers and potential plaintiffs throughout the country will continue to have their legal claims resolved inconsistently without some manner of intervention by this Court.

The intersection of the qualified immunity issue with the underlying Fourth Amendment issue makes this case of exceptional importance. In the many states and localities encompassed by the Ninth and Second Circuits, their holdings will effectively require law enforcement officers to execute warrants in secret, upon pain of incurring personal liability for monetary damages. The resulting closed regime of law enforcement operations would disserve, rather than advance, the fundamental constitutional interests that the Fourth Amendment is designed to protect.[5]

Finally, the regime of qualified immunity laid down by these two courts is untenably strict. At present, notable judges of the various lower federal courts remain in sharp disagreement over the merits of the underlying constitutional issues applying the Fourth Amendment. Yet law enforcement officers in the Second and Ninth Circuits are being held personally liable for having to make guesses in gray areas of the law, and not simply for transgressing bright lines. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue in

[5] Indeed, in *Wilson*, the Fourth Circuit stated that it is in fact "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission." *Wilson*, 1998 WL 159673, at *5 (quotations omitted).

this case, petitioners cannot plausibly be placed in either category. This Court has repeatedly warned the lower courts that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also id.* at 563-65 & nn.8-10. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce that ostensibly clear message to the lower courts once again.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the qualified immunity issue.

Respectfully submitted,

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May 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	) No. 96-35251) DC No. CV-95-) 00046-JDS	
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	) No. 96-35266) DC No. CV-94-) 00046-JDS) OPINION	

Appeals from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 19, 1996--Seattle, Washington
Filed November 13, 1997

Before: Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges, and Rudi M. Brewster,* District Judge.

OPINION

SCHROEDER, Circuit Judge:

When federal agents searched the ranch of Paul and Erma Berger in March of 1993, they acted not only pursuant to a search warrant, but also pursuant to a written contract with appellees Cable News Network and Turner Broadcasting System, authorizing the filming and recording of the search for broadcast on their environmental television shows "Earth Matters" and "Network Earth." The media wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity.

After Mr. Berger was convicted of one misdemeanor count for using a pesticide in a manner inconsistent with its labeling, 7 U.S.C. § 136j(a)(2)(G), and acquitted of three felony counts of the killing of at least one eagle, the Bergers sued both the media and the federal agents under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for the violation of their constitutional rights. The Bergers also sued the media for the violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*, for various state law torts, and to enjoin further broadcasts of the video shot at their ranch. The Bergers' principal contentions under federal law are that (1) the federal agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the media in their search for dramatic material, and (2) the media acted sufficiently in concert with the

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* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

federal agents to be held accountable for that violation as government actors.

On the *Bivens* action, the district court ruled that the federal agents were entitled to qualified immunity because there was, at the time of this episode, no clearly established law protecting individuals from the commercial recording of a search of their residences. The court also held that the Bergers were collaterally estopped from litigating the reasonableness of the search because the same issues had been decided adversely to Mr. Berger in his criminal trial. In addition, the court rejected the Bergers' claim that the media had become government actors for purposes of *Bivens* liability.

We reverse the judgment in favor of the federal appellees on the Fourth Amendment claim because we hold the federal officers are not entitled to qualified immunity in this case. Because we hold that the issues litigated in the criminal proceeding were not the same as the issues presented to the district court in this civil suit, we also reverse the district court's ruling that this action is barred. The judgment in favor of the media on the *Bivens* claim is reversed because, on the basis of the present record, we must consider the media to have acted jointly with the federal appellees, and hence "under color of law." We affirm the district court's ruling that the media are not liable under the Federal Wiretap Act, however.

On the state law claims, we reverse the court's ruling in favor of the media on the trespass and infliction of emotional distress causes of action. We affirm the ruling on the conversion claim, and decline to enjoin further broadcasts.

In reviewing the grant of summary judgment to the appellees, we view the evidence in the light most favorable to the Bergers. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

FACTS AND PROCEDURAL BACKGROUND

Paul and Erma Berger reside on a 75,000 acre ranch in Montana. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. In January of 1993, former employees of the Bergers apparently went to the United States Fish and Wildlife Service ("USFWS") and told USFWS agents that they had seen Mr. Berger poison or shoot eagles a few years earlier. Upon hearing about that investigation, the media appellees, Cable News Network, Inc. and CNN employee Jack Hamann, together with Turner Broadcasting System, Inc. and TBS employees Robert Rainey and Donald Hooper, approached agents of USFWS to see if a television deal could be worked out. The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime. On March 11, 1993, approximately two weeks before the search was executed, the Assistant U.S. Attorney in charge of Mr. Berger's investigation, federal-appellee Kris McLean, and media correspondent Jack Hamann, executed the following letter agreement on CNN letterhead:

> Dear Mr. McLean:
>
> This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage.
>
> In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until

> either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant.
>
> Please acknowledge your agreement to the foregoing by executing the signature line below.
>
> Sincerely, Jack Hamann, Correspondent, CNN Environmental Unit.
>
> Acknowledged signature of Kris McLean, Assistant United States Attorney for the District of Montana, Helena, Montana.
>
> cc: Jennifer Falk Weiss, CNN Legal Department.
> Chet Burgess, CNN Environmental Unit.

On March 18, a magistrate judge issued a search warrant for the Bergers' ranch, authorizing the search of the ranch and appurtenant structures, excluding the residence, for evidence indicating the taking of wildlife. According to the Bergers, the magistrate judge had no knowledge of the planned media participation during the search, and there is no contention by the appellees that when the magistrate judge issued the warrant, he approved the videotaping of the search for broadcast purposes.

According to the Bergers, the media participated in a pre-search briefing the day before the search, at which the federal appellees shared with the media details of the material included in the warrant and supporting materials that were supposed to remain under seal until after the search.

On the morning of the search, the government team, accompanied by a media crew, gathered on a county road leading to the ranch, to discuss the execution of the warrant. The cameras videotaped that gathering. The broadcast team then proceeded with the federal agents and AUSA McLean in a caravan of approximately ten vehicles to a point near the Bergers' ranch. Media cameras mounted on the outside of government vehicles, or placed in their interior, documented every move made by the federal appellees. At all times during and immediately prior to the search, USFWS Special Agent Joel Scrafford was wired with a hidden CNN microphone which was continuously transmitting live audio to the CNN technical crew.

Mr. Berger approached and met the caravan in a pickup truck on the road leading up to the ranch. Agent Scrafford proceeded to inform Mr. Berger of the search warrant, and asked him whether he could ride to the house in Mr. Berger's truck so that he could explain to Mrs. Berger what they were going to do. Mr. Berger allowed Agent Scrafford to ride with him in the pickup truck. Upon arriving at the Bergers' residence, the two men entered the house together. Audio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time. The parties disagree on whether the agents who entered the residence with Agent Scrafford searched the residence for incriminating evidence, and whether Agent Scrafford's subsequent entries into the home were consented to. However, it is undisputed that Agent Scrafford recorded all his conversations with the Bergers inside the house.

The Bergers were not informed that Agent Scrafford was wearing a microphone or that the cameras that were visible during the search belonged to the media. The media recorded more than eight hours of tape and it broadcast both the video footage and the sound recordings made in the house.

Mr. Berger was tried on an amended information charging him with the taking of at least one golden eagle, in violation of 16 U.S.C. § 668(a); the killing of one ferruginous hawk, and one ring-billed gull, in violation of 16 U.S.C. §§ 703 and 707(a); the taking of at least one bald eagle in violation of 16 U.S.C. § 1538(a)(1)(B) and 16 U.S.C. § 1540(b)(1); and the use of a registered pesticide, Furadan, in a manner inconsistent with its labeling. The charge was that Mr. Berger applied Furadan to sheep carcasses with the intent of killing predators, including eagles, in violation of 7 U.S.C. §§ 136j(a)(2)(G).

Before trial, the magistrate judge denied a defense motion to suppress evidence on the grounds that the agents lacked probable cause to search and that the warrant did not accurately describe the property to be searched. Mr. Berger was acquitted of all charges, except the misdemeanor charge of using Furadan contrary to its labeling.

The Bergers filed two actions in 1995, which proceeded on identical courses. The district court entered a final judgment in favor of all the appellees in both cases in February 1996, and these parallel timely appeals followed.

COLLATERAL ESTOPPEL

The district court ruled that because issues concerning the constitutionality of the search have already been litigated in Mr. Berger's criminal case, this action was barred by collateral estoppel. The court relied on *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991), which holds that a plaintiff is estopped from bringing a civil action to challenge an issue which was " 'distinctly put in issue and directly determined' in a previous criminal action", and *Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993), which affirmed the dismissal of a *Bivens* action based on the preclusive effect of a Fourth Amendment ruling in a previous criminal action.

The difficulty with the district court's reasoning is that a party is generally estopped or precluded from litigating only those issues that have previously been decided. *See Allen v. City of Los Angeles*, 92 F.3d 842, 849 (9th Cir. 1996); Restatement (Second) of Judgments § 27. Collateral estoppel can thus be used in a civil action to bar relitigation of issues decided in a prior criminal proceeding, but, as *Bagley* recognized, a party may only be estopped from bringing a civil action to challenge a particular issue if that issue was " 'distinctly put in issue and directly determined' in a previous criminal action." *Bagley*, 923 F.2d at 762 (quotation omitted).

Because the magistrate judge in the criminal case was not presented with the specific issues raised in this action, the district court erred in holding that the Bergers' *Bivens* action was barred. In the *Bivens* claim, the Bergers are concerned with whether the search was unreasonable because of the media's involvement in the search.

In his motion to suppress in the criminal case, on the other hand, Mr. Berger challenged the validity of the warrant itself. He contended that (1) it failed to establish probable cause because it contained no facts indicating either the veracity of the informants, or independent law enforcement investigation to corroborate the information given by the informants; (2) the search warrant was stale; and (3) the property designated in the search warrant was improperly described.

The magistrate judge's rulings directly responded to these, and only these arguments. He agreed with the government that (1) the veracity of the informants could be presumed and that no corroboration was required; (2) the facts set forth in the affidavit indicated that Mr. Berger was engaged in an ongoing pattern of criminal activity, so the evidence was not stale, and (3) although the description of the real estate in the warrant was "grossly excessive and inaccurate," the defect did not rise to such a level

as to "offend[ ] the Constitution."

This case is thus fundamentally different from *Matthews*, on which the district court relied. In *Matthews*, the plaintiff incorporated by reference in his *Bivens* brief the same Fourth Amendment arguments he had presented in his criminal appeal, i.e., that the affidavit submitted in support of the search warrant would not have established probable cause had the affiant not misled the issuing court. Because a panel of this court had already held in Matthews' criminal appeal that the affidavit did establish probable cause, the panel reviewing Matthews' *Bivens* action correctly deemed the civil action barred by collateral estoppel. *Matthews*, 990 F.2d at 466. By contrast, the arguments and issues raised in the motion to suppress in this case were not the same as the arguments and issues raised in the Bergers' *Bivens* action, and therefore, collateral estoppel does not bar this civil suit.

THE BIVENS CLAIM

1. *The violation of the Fourth Amendment and immunity*

The Bergers claim that the federal appellees, AUSA Kris McLean and USFWS Special Agents Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell and Robert Prieksat, are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch. The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officials are not entitled to qualified immunity.

This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media

obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

Regardless of whether a constitutional violation has occurred, the federal appellees are, of course, entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285 (9th Cir. 1996). The federal appellees contend that even if the search was unconstitutional, they could have reasonably believed their conduct was lawful.

The Second Circuit has held that qualified immunity does not protect federal officers in a case where a Secret Service agent invited a TV news magazine into a private home to

videotape a search. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). *Ayeni* affirmed District Judge Weinstein's decision in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Second Circuit held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible. This was in part because of a federal statute prohibiting any persons, other than law enforcement personnel and those assisting them from executing search warrants, 18 U.S.C. § 3105. It was in major part because the publicity purpose would "magnify needlessly the impairment of their right of privacy." *Id.* at 686.

Similarly, the Fourth Circuit has held that where the federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity. *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). Though noting *Ayeni* with approval, the Fourth Circuit said "[w]e would so hold even if there were no reported authority directly on point," *id.* at 356, because the historical foundations of the Fourth Amendment and the statute discussed above so plainly showed that "[t]he right to be free from government officials facilitating a private person's general search" was "'manifestly included' within the 'core' Fourth Amendment protection." *Id.* at 357. *See also Anderson v. WROC-TV*, 441 N.Y.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.").

We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of

a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant. The cases on which the federal agents rely do not hold such searches are constitutional. In *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), the Sixth Circuit held that police were justified in permitting a television crew to be present when the warrant itself expressly authorized photography and videotaping. In *Parker v. Bayer*, [sic] 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), a majority held officers had immunity in permitting a television crew to be inside a house during a search, but one member of the panel, Judge Rosenbaum, wrote separately to state that in his view the Fourth Amendment had been violated. Another, Judge Richard Arnold, wrote that in his view the media defendants were joint actors with the police in allegedly violating constitutional rights. *See id.* at 448-49. In *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *vacated* July 30, 1997, a majority of the panel held that the police had qualified immunity when they permitted newspaper reporters and photographers to accompany them while searching a house, but specifically refused to decide the issue of the reasonableness of the search. The dissenting member of the *Wilson* panel, Judge Russell, would have denied immunity and held the conduct patently unreasonable. The entire court has now reheard the case en banc.

In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case. The defendants rely on a trio of older, lower court decisions that upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity. *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768, 774

(Wis. Ct. App. 1980). In those cases, however, the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here. Indeed we have already recognized the differences between videotaping searches for law enforcement purposes and for entertainment. *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) (as amended on denial of rehearing Feb. 26, 1997, petition for cert. filed May 27, 1997). We there noted that our court and others have assumed without deciding that videotaping for law enforcement purposes does not render a search unreasonable, *see id.* at 1032 n.37, but recognized that a different result might be required if the recording were for other purposes. We cited the Second Circuit's decision in *Ayeni*, that squarely held a residential search videotaped by commercial television cameras was unreasonable, and the officers unprotected by qualified immunity. We reach the same legal conclusions in this case.

2. *The Open Fields Doctrine*

The appellees also claim that they could have violated no privacy interests in videotaping the shed and other outbuildings on the ranch, because their cameras shot footage only from the open fields or of structures in which the Bergers had no expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 516-17 (1967) (the Fourth Amendment is not triggered unless the government intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy).

Because the Fourth Amendment speaks only to "persons, houses, papers, and effects," an individual cannot claim a constitutional violation on account of law enforcement officers' warrantless searches of their "open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446 (1924) (Holmes, J.);

and see United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134 (1987); *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *United States v. Van Damme*, 48 F.3d 461, 464-65 (9th Cir. 1995).

This argument misses the mark in this case. The open fields doctrine is not a license for the police to bring trespassers on to private property. It allows law enforcement officers to obtain evidence while on privately owned open fields. It would thus entitle the officers to prevail if the Bergers were suing them for a warrantless search of open fields for evidence of criminal activity. It does not immunize the officers from liability for conduct that has no law enforcement purpose.

Moreover, there is evidence in the record that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that they were located close to the house and guarded by a dog. The officers would not have reasonably believed the search of the outbuilding involved open fields for which no warrant was required, much less that the open fields doctrine authorized third parties to trespass.

3. *The Invited Informer Doctrine*

Throughout the execution of the search warrant, Agent Scrafford wore a microphone that transmitted live to the media the conversations between him and the Bergers in their house. The media appellees recognize that the home was outside the scope of the search warrant and that the Bergers did not consent to the microphone's entry into the home. They claim, however, that their surreptitious recording of the Bergers' conversations did not violate the Bergers' Fourth Amendment rights because the Bergers consented to Scrafford's presence and to his being a party to the conversations.

The appellees rely on the "invited informer" or "misplaced confidence" doctrine to support their claim. *See, e.g., United States v. White*, 401 U.S. 745, 91 S. Ct. 1122 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990). The invited informer doctrine was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). In *Aguilar*, we held that the invited informer doctrine justifies the use of undercover agents and informers, as long as their use is part of a good faith government investigation. *See also Reporters Committee v. American Telephone & Telegraph*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) ("once [people] project[ ] [their] activities beyond [their] private enclave, the Government is free to scrutinize them for law enforcement purpose"). The invited informer doctrine is thus rooted in the principle that privacy interests must give way to legitimate government scrutiny when a communication is voluntarily made to a third party. Our court in *Aguilar* made this rationale clear when it explained that:

> In approving this investigative technique, the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. The Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

Aguilar, 883 F.2d at 703.

The invited informer doctrine does not apply in this case, because the surreptitious recording was not done for a

legitimate law enforcement purpose. The recording in this case materially differs from the invited informer cases where the informer was assisting law enforcement. Here, law enforcement authority was used to assist commercial television, not to further law enforcement objectives.

The appellees further contend that the Bergers' conversations must have been "voluntary" because the magistrate judge in the criminal proceeding refused to suppress Mr. Berger's statements for lack of the *Miranda* warnings. Their contention is without merit. The only finding the magistrate judge made was that Mr. Berger had not been placed under the functional equivalent of a formal arrest when he made the statements, so his *Miranda* rights did not attach. *See Berkemer v. McCarthy*, 468 U.S. 420, 440-42, 104 S. Ct. 3139, 3150-52 (1984). He did not rule that Mr. Berger's statements were "voluntary."

The invited informer doctrine thus does not shield the media from liability. We recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *Dietemann* involved the exposing of a quack doctor by media reporters who were cooperating with law enforcement officers. In *Dietemann*, conversations between the reporters and the fraudulent doctor were secretly relayed to law enforcement officers for use in their investigation, and then used in a story published by the media. Like the media appellees here, the media defendants in *Dietemann* attempted to use the "invited informer" doctrine to escape liability. We rejected their defense and explained our decision as follows:

> Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den.

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different ruling could have a most pernicious effect upon the dignity of man. . . .

Dietemann, 449 F.2d at 249.

We therefore hold that the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that appellees infringed that privacy when they recorded the Bergers' conversations inside the house.

The Media as Government Actors

The final issue we must consider in the Bergers' *Bivens* action is whether the media appellees may be held liable even though they were not agents or employees of the federal government. Ordinarily, *Bivens* liability and the corresponding liability of state actors under 42 U.S.C. § 1983, attaches only to the acts of government officials. *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Private parties may be held liable, however, if they are deemed to have acted "under color of law." *Id.* at 1117 (citing *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (owners who obtained pervasive police assistance in evicting tenants were deemed to be joint actors with police)); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). *See also Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1984), which held that "private status . . . , even if deemed a special factor, is not alone sufficient to counsel hesitation in implying a damages remedy when the private party defendants jointly

participate with the government to a sufficient extent to be characterized as federal actors. . . ."

In deciding whether conduct of private parties amounts to government action we engage in a highly factual inquiry. *Howerton*, 708 F.2d at 383 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961)). Four tests have been developed to facilitate this inquiry. *See Johnson* at 1118-20, where we explained each test. These tests are: (1) the governmental nexus test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974) (courts must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself"); (2) the public function test, *see Jackson*, 419 U.S. at 352, 95 S. Ct. at 454 (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state); (3) the state compulsion test, *see Blum v. Yaretzky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982) ("a [s]tate normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [s]tate"); and finally, (4) the joint action test, *see Dennis v. Sparks*, 449 U.S. 24, 27, 101 S. Ct. 183, 186 (1980) (private actors can be considered [government] actors if they are "willful participant[s] in joint action withe the [government] or its agents").

The appropriate test in this case is the joint action test. The Supreme Court has said it is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party. *See Dennis*, 449 U.S. at 27-28, 101 S. Ct. at 186 (1980) ("Private persons, jointly engaged with [government] officials in the challenged action, are acting 'under color' of law for purposes of [*Bivens*] actions."); *Adickes v.*

S.H. Kress and Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605 (1970) ("The involvement of a [government] official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's [constitutional rights], whether or not the actions of the [government official] were officially authorized, or unlawful."); *United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 1156 (1966) ("Private persons, jointly engaged with [government] officials in the prohibited action, are acting 'under color' of law for purposes of [*Bivens*]."). Our cases are in accord. *See Howerton, supra*; *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 746 (1997); *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 (9th Cir. 1996); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action therefore requires a substantial degree of cooperative action."). *See also Gorenc v. Salt River Project Agr. Imp. & Power*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Wilmington Parking Authority*, 365 U.S. at 725, 81 S. Ct. at 862, and explaining that joint action may take the form of a "symbiotic relationship" where the government has " 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity. . .' ")

In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute -- the execution of a search warrant -- for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet

caring investigators, rather than to further their investigation. This satisfies the joint action test.

At least one distinguished circuit judge has suggested that the media's entry onto searched premises by virtue of government authority would alone be sufficient to constitute joint action. *See Parker*, 93 F.3d at 449 (Richard Arnold, J., dissenting). Judge Arnold noted that "[t]he news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted." *Id.* Given the record before us, however, we need not go so far. This is because under our own circuit authority, the "inextricable" involvement of the media with both the planning and execution of this search, the government's active involvement with the media's news gathering activities, and the mutually-derived benefits, is more than enough to make the media government actors. *See Gorenc, supra*, quoting *Wilmington Parking Authority*, 869 F.2d 503.

The cases relied on by the district court are unavailing because they involved situations in which the private parties conducted searches on their own, and not under the government's cloak of authority. *See United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In *Miller* a theft victim went to the defendant thief's property to look for his stolen trailer. Although a police officer acquiesced in the visit and provided some protection from afar by keeping watch through binoculars while the victim took photographs of his stolen trailer, the officer took no active part in the search. *Miller*, 688 F.2d at 656-58. In *Jennings*, a private party, an airline security manager, searched a package containing drugs, after receiving information from the Drug Enforcement Administration. The court held that notwithstanding the fact that a DEA agent passively observed the search, the search did

not implicate the Fourth Amendment because the private entity independently decided to conduct the search, and acted for its own benefit, rather than as a surrogate for the government. *Jennings*, 653 F.2d at 110-11. While the media here collaborated with the government in order to conduct a search for its own benefit, there was nothing passive about the government's involvement with the media in this case. They acted together.

FEDERAL WIRETAP STATUTE

Next, the Bergers claim that the media appellees violated the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, by intercepting for broadcast the Bergers' conversations with Agent Scrafford in the home. The Act is a broad prohibition against warrantless, surreptitious interceptions of wire, oral or electronic communications. 18 U.S.C. § 2511(1)(a)(c).

The Act, however, also contains a broad exception for conversations recorded by persons acting under color of law. That exception provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party of the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c).

We have held that the media appellees were acting under color of law for purposes of *Bivens* liability. We recognize that the scope of the phrase "under color of law" in the wiretap context is not equivalent to the scope of the phrase in the general section 1983 or *Bivens* context. *See, e.g., Thomas v.*

Pearl, 998 F.2d 447, 450-51 (7th Cir. 1993). *Thomas* held that a basketball coach who was a university employee and who tape-recorded a conversation with an athlete was not acting "under color of law" for purposes of the Federal Wiretap Act. We agree that the "under color of law" exception under the Act was not created to exempt all government employees from liability for recording conversations when only one party has consented: Its core aim must have been to exempt those acting under law enforcement authority. Because both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies, and because Agent Scrafford, a party to the conversations, consented to the interception, we hold the media appellees not liable under the Federal Wiretap Act.

STATE LAW CLAIMS

Trespass

The Bergers have asserted a claim against the media for trespass. The Bergers allege that the media committed the tort by (1) entering into their home, for which there was no warrant, and (2) by generally being present at the Bergers' ranch during the execution of a search warrant that they contend authorized only the law enforcement officers to enter their property. Trespass is generally premised upon the intentional interference with the property rights of another without consent. *See Ducham v. Tuma*, 877 P.2d 1002, 1005 (Mont. 1994). *Ducham* quoted Restatement (Second) of Torts § 158: "One is subject to liability . . . for trespass, irrespective of whether he thereby causes harm . . . (a) if he intentionally enters land in possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Id.* *See also* Restatement (Second) of Torts § 167 (consent is an absolute defense to trespass).

The district court held that the Bergers had no possessory interest in the ranch at the time of the search because the government agents had temporary possession and control of the Bergers' land during the execution of the search. *See, e.g., Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), where the Sixth Circuit explained that where an intrusion is justified, the officers executing the search are "placed in control of the premises." *Bills* recognized, however, that such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement. *Id.* The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement.

The district court's reasoning is even more problematic insofar as it was applied to the media's entry into the Berger home, a place that the government did not have a warrant to search. Although Mr. Berger consented to Agent Scrafford's initial entry into the home, he never consented to the entry of the media-owned microphone that Agent Scrafford wore. In addition, the media could not have benefitted derivatively from the consent extended to Agent Scrafford, because without a warrant, Agent Scrafford was not in control and possession of the home, and therefore, had no valid authority to supply the requisite consent.

The media's contention that their entry was impliedly consented to by "custom and usage," is also unavailing. *See Florida Pub. Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1977) (implying consent from a longstanding "custom and usage" of permitting the media to enter private property where a conflagration had consumed a house, causing death, and where the Florida Supreme Court characterized the fire as "a disaster of great public interest," and a "calamity"). *Fletcher* involved a disaster, which this case does not. Other courts have similarly

distinguished *Fletcher* on its facts. *See Prahl*, 295 N.W.2d at 779, *WROC-TV*, 44 N.Y.2d at 223.

Although neither the district court nor this court has exhaustively researched Montana trespass law, we have no reason to believe it departs from the generally recognized principles we have discussed. We therefore remand for the district court's further consideration of the Bergers' claim for trespass against the media.

Conversion

The Bergers sued the media appellees for conversion on the basis of the media's capture of their images and voices. The district court found that recorded sounds and images cannot be the subject of a conversion claim. We agree.

To make out a valid conversion claim under Montana law, a plaintiff must prove that (1) he owns the property converted, (2) has a right to its possession, (3) the converter exercised unauthorized dominion over that property, and (4) the property owner has suffered damages as a result of the conversion. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1994) (citation omitted). The Bergers' images and sounds are intangible, and intangible property interests have not traditionally been subject to conversion. *See* Prosser & Keeton, Law of Torts § 15 (5th ed. 1985); Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.01[B](1)(i) (1995) ("The torts of conversion and trespass relate to interference with tangible rather than intangible property. . . ."). Although the common law rule has been relaxed somewhat, and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document, it has not yet been extended further. *See* Restatement (Second) of Torts, § 242 and comments; *Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 236 (8th Cir. 1996) (holding that even under the "expanded definition of

the tort" under New York law, the business concept and appearance of a diner could not be "converted" since the claimed property rights were not rights customarily merged in a document); *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) ("it has never been held that one's countenance or image is 'converted' by being photographed"). No Montana court has recognized a cause of action for the "conversion" of sounds and images. The Bergers, therefore, have not stated a claim for conversion.

Intentional Infliction of Emotional Distress

Under Montana law, this cause of action may arise "if there was serious or severe emotional distress to the plaintiff which was a reasonable [sic] foreseeable consequence of the defendant's negligent or intentional act or omission." *See Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 429 (1995).

The district court rejected this claim on the ground that it had already found that none of the media appellees' acts were unlawful, and therefore, emotional distress could not have been a reasonably foreseeable consequence of their actions.

In light of our holding that the Bergers have alleged a claim of interference with both their privacy and their property interests, we also remand this claim to the district court for reconsideration upon a fully developed record.

INJUNCTION

The Bergers also sought an injunction preventing the media appellees from further broadcast of any or all parts of the video and sound gathered during the search. We agree with the district court that this is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S. Ct. 912,

914 (1994) (Blackmun, Circuit Justice, staying preliminary injunction) (citations omitted). Even though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers).

CONCLUSION

We reverse the district court's judgment in favor of the federal appellees in the Bergers' *Bivens* claim, and also reverse the judgment in favor of the media appellees on that claim. We also reverse and remand the judgment in favor of the media appellees on the Bergers' state law claims for trespass and intentional infliction of emotional distress, but otherwise affirm the judgment of the district court.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART for further proceedings. Costs are awarded to Appellants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PAUL W. BERGER and ERMA R. BERGER,	)	
	)	Cause No. CV-95-46-BLG-JDS
Plaintiffs,	)	
vs.	)	
RODNEY HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. McLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, **ROBERT RAINEY, DONALD HOOPER,** and **UNITED STATES OF AMERICA,**	)	MEMORANDUM AND ORDER
Defendants.	)	

Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in United States v. Paul W. Berger, and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by

defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald Hooper (Hooper). Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their Fourth Amendment right to be free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey, and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, 18 U.S.C. § 2511, against TBS, Rainey and Hooper.

I. The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. Fed. R. Civ. P. 56(e). However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. Romero v. Kitsap County, 931 F.2d 624, 628 (9th Cir. 1991).

The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly violate the law." Schroeder v. McDonald, 55 F.3d 454, 461 (1995) (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Elder v. Holloway, 114 S. Ct. 1019, 1021 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. See Romero, 931 F.2d at 627-28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Romero, 931 F.2d at 628. The determination of whether an asserted federal right was clearly established at a particular time is a question of law. Elder, 114 S. Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would

have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. Romero, 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable officer would have understood that what he was doing violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). In light of pre-existing law, the unlawfulness of the act must have been apparent. Id. If the law was not clearly established, then summary judgment must be granted.

Discussion

A. Motion for Summary Judgment

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. See Harlow, 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

The operation of the Harlow qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. Anderson, 483 U.S. at 639; Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993). A

plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. Anderson, 483 U.S. at 639. The Anderson Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." Anderson, 483 U.S. at 639. The right referred to by the Harlow test is not a general constitutional guarantee, but rather it is the application in a particular context. See Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988).

The Harlow standard is an objective inquiry. Kirkpatrick v. Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act. See, e.g., Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho, 42 F.3d 1278, 1285 (9th Cir. 1994),; Davis v. Scherer, 468 U.S. 183, 197 (1984). In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. Figueroa v. United States, 7 F.3d 1405, 1409 (9th Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994); Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990).

The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. Kirkpatrick, 803 F.2d at 490. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. Figueroa, 7 F.3d at 1409; Wood, 879 F.2d at 591. The analysis begins by examining those cases that are

"most like" the instant case. Figueroa, 7 F.3d at 1409. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. See Harlow, 457 U.S. at 818-19; Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989).

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on United States v. Sanusi, 813 F. Supp. 149, 157-59 (E.D.N.Y. 1992), and Ayeni v. CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The Ayeni case arose from the search underlying the Sanusi case. Both cases, however, can be distinguished.

The Sanusi case involved the news-gathering privileges of the media and whether the media had to turn over to the defendant a videotape taken at the execution of a search warrant. The case did not involve the question of qualified immunity.

The district court in Ayeni was affirmed by the Second Circuit in Ayeni v. Mottola, 35 F.3d 680 (1994), cert. denied, 115 S. Ct. 1689 (1995). The Ayeni case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the Ayeni case involved the search of a home, where privacy interests are at their greatest. The Ayeni Court addressed the general Fourth Amendment right of privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. Ayeni, 35 F.3d at 686.[1] The Sixth Circuit and this Court

[1] In analyzing the general Fourth Amendment right instead of the specific application of that right, the Ayeni Court stated that it has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-established principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. Ayeni, 35 F.3d at 686.

recognize the error made by the Second Circuit. See Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) (criticizing the Ayeni Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in Anderson).

Additionally, the Ayeni case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. See Baker, 887 F.2d at 187 (post-incident decisions cannot clearly establish the law at the time of the conduct in question).

Furthermore, citing to United States v. Wright, 667 F.2d 793 (9th Cir. 1982), and United States v. Clouston, 623 F.2d 485 (6th Cir. 1980), the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only that at the time of the Berger search the Fourth Amendment did not prohibit the use of a third party at a search if that party was aiding the officer in searching for items either specified in the warrant or within plain view of those items specified. See Wright, 667 F.2d at 797 (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); Clouston, 623 F.2d at 486-87 (presence of telephone company employee, who

was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

Finally, in a supplemental filing, the plaintiffs presented the case of Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) in support of their position. The Buonocore decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. Buonocore, 65 F.3d at 350. Furthermore, although the search in Buonocore took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated

constitutional rights by allowing media representatives to attend and observe. For example, in Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984), the Court found that officers did not violate the Fourth Amendment when they told the media what time the search would be executed and then refused to make the media leave during the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, Higbee v. Times-Advocate, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980) and Moncrief v. Hanton, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980), was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was unwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. Id. at 774.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the federal defendants help demonstrate that courts (and officers) were lacking clear authority on this issue at the time of the Berger search.

In addition to case law, the Bergers also rely on 18 U.S.C. § 3105, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the Fourth Amendment. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his

requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-approved search into a general search for things not specified in the warrant. Neither 18 U.S.C. § 3105 on its face nor pre-March 1993 case law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the Fourth Amendment.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. See Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985). When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is that the law was perhaps beginning to evolve toward the view that the Fourth Amendment may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. Motions for Judicial Notice

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division,

United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of United States v. Paul W. Berger, No. CR 93-46-BLG-RWA (D. Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. The defendants' (TBS, Rainey, and Hooper) motion for summary judgment.

The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed. R. Civ. P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of

material fact. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." Kaiser Cement Corp. v. Fischback & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., 809 F.2d at 630 (citing, Liberty Lobby, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." Id.

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. Id. at 631. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common

law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. Collateral Estoppel

The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the Fourth Amendment was not previously adjudicated, that TBS' involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated. United States v. Paul W. Berger, CR 93-46-BLG-RWA (D. Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a Bivens action in this case. See Matthews v. Macanas, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent Bivens civil action is barred by collateral estoppel); Bagley v. CMC Real Estate Corp., 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), cert. denied, 502 U.S. 1091 (1992). A Bivens action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

The Bergers' Fourth Amendment claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under Bivens. See United States v. Miller, 688 F.2d 652, 657-58 (9th Cir. 1982); United States v. Jennings, 653 F.2d 107, 110 (4th Cir. 1981). In this case, the defendants were not acting under the color of federal law.[3]

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[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. Prahl v. Brosamle, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980).

[3] To establish a Bivens action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

B. Federal wiretap statutes

The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communications where one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that

there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. See, e.g., Desnick v. American Broadcasting Co., Inc., 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); United States v. Mullins, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), cert. denied, 114 S. Ct. 556 (1993).

C. Request for Injunction

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." CBS, Inc. v. Davis, 114 S. Ct. 912, 914 (1994) (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." CBS, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. Common law Claims

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and

intentional infliction of emotional distress.[4]

1. Conversion

In their conversion count, the plaintiffs allege that the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. Eatinger v. Johnson, 887 P.2d 231, 234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 903 (9th Cir. 1992), cert. denied, 113 S. Ct. 2927 (1993).

The Montana Supreme Court has never held that recorded sounds and images can be the subject of a conversion action. Other courts however have concluded that they cannot. See, e.g., Ault v. Hustler Magazine, Inc., 860 F.2d 877, 883 (9th Cir. 1988) (use of one's photographic image is not proper grounds for conversion action), cert. denied, 489 U.S. 1080 (1989);

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[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employee Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 orders.

Zacchinin [sic] v. Scripps Howard Broadcasting Co., 351 N.E.2d 454, 457 (Ohio 1976) (one's image is not converted by being photographed), rev'd on other grounds, 433 U.S. 562 (1977); Ippolito v. Lennon, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989) (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). See also, FMC Corp. v. Capital Cities/ABC, 915 F.2d 300, 303 (7th Cir. 1990) (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. Ault v. Hustler Magazine, Inc., 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in Ault. The Ault Court held that the photographs were the property of the photographer, not of the person photographed. Id. While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. Id.

2. **Trespass**

The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. See Salisbury Livestock Co. v. Credit Union, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to

be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Exhibit A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. See Desnick, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." Desnick, 44 F.3d at 1351.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. **Intentional Infliction of Emotional Distress**

Finally, the Bergers allege a cause of action for intentional infliction of emotion [sic] distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which

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[5] This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. Sacco, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. Sacco, 896 P.2d at 427.

This Court has already found that the media defendants did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotional distress claim fails.

E. Declaratory Judgment

The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa., 873 F.2d 228, 231 (9th Cir. 1989) (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	No. 96-35251 DC No. CV-95-00046-JDS
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	No. 96-35266 DC No. CV-94-00046-JDS (D. Montana) ORDER

Before: SCHROEDER and KLEINFELD, Circuit Judges, and BREWSTER,* District Judge.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

*Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

FILED

FEB 25 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	)	No. 96-35251 DC No. CV-95- 00046-JDS
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	)	No. 96-35266 DC No. CV-94- 00046-JDS (D. Montana)
	)	ORDER

Before: SCHROEDER, Circuit Judge.

The Motion to Stay the Mandate Pending Filing of a Petition for Certiorari is granted pursuant to Federal Rule of Appellate Procedure 41.

F I L E D

MAR 13 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS